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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 148

MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE AND WEST SIDE BANK,

PETITIONERS,

vs.

KALT-ZIMMERS MANUFACTURING COMPANY AND M. H. GROSSMAN, TRUSTEE IN BANKRUPTCY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 148

IN THE MATTER OF HACKETT, HOFF & THIERMANN, INC., BANKRUPT.

MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE AND WEST SIDE BANK,

PETITIONERS,

vs.

KALT-ZIMMERS MANUFACTURING COMPANY AND M. H. GROSSMAN, TRUSTEE IN BANKRUPTCY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Marine National Exchange Bank of Milwaukee, a national banking association, and West Side Bank, a Wisconsin banking corporation, located at Milwaukee, Wisconsin, respectfully show:

A.

Summary Statement of the Matter Involved.

Petitioners separately petitioned the Referee in Bankruptcy in the matter of Hackett, Hoff & Thiermann, Inc.,

bankrupt, for authority to sell collateral pledged for value by the bankrupt to petitioners respectively, namely, certain bearer bonds of the face amount of Fourteen Thousand Five Hundred Dollars ($14,500) executed and issued at Milwaukee, Wisconsin, by respondent, Kalt-Zimmers Manufacturing Company, a Wisconsin corporation (R. 5, 15).

Respondent, Kalt-Zimmers Manufacturing Company, intervened, answered the petitions, and filed cross-petitions (R. 8, 19). It alleged that the bankrupt, as trustee of the trust indenture securing the bonds, had pledged the bonds for the bankrupt's individual indebtedness, and such bonds had been issued without consideration and petitioners were not *bona fide* holders thereof (R. 8-11, 19-22).

Petitioners respectively answered the cross-petitions alleging that the bonds were negotiable and that they were *bona fide* holders thereof for value (R. 12, 22).

The issues between respondent and each of petitioners were heard and determined together by stipulation (R. 25).

The primary issues were whether said bonds were negotiable instruments and whether petitioners were holders thereof in due course without notice of any defect in the title to said bonds within the meaning of Section 116.61, Wisconsin Statutes of 1929 (part of Negotiable Instruments Law), reading as follows:

> "*Actual knowledge of infirmity necessary to notice.* To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The Supreme Court of the State of Wisconsin in *Pollard* v. *Tobin*, 211 Wis. 405 (1933), had construed and applied this section of the statutes in a case involving identical issues. Under substantially identical facts, the Supreme

Court of the State of Wisconsin held bonds of identical form and terms to be negotiable, and the pledgee bank to be a *bona fide* holder without notice of any defect in the title of the pledgor to said bonds.

The Referee in Bankruptcy reached the same conclusion as the Supreme Court of the State of Wisconsin, namely, that the Kalt-Zimmers Manufacturing Company bonds were negotiable instruments, and that petitioners were *bona fide* holders for value of said bonds (R. 69-72). He entered an order denying the cross-petitions and authorizing the sale of the bonds by the pledgee banks under their pledge agreements (R. 72).

The District Court of the United States for the Eastern District of Wisconsin on a petition for review, filed by respondent, Kalt-Zimmers Manufacturing Company, reversed this order of the Referee in Bankruptcy primarily on the ground that petitioners had constructive notice of a defect in the title to said bonds, and directed the return of the record to the Referee in Bankruptcy for further proceedings (R. 77-79). The opinion of the District Court is reported in 6 Fed. Supp. 638.

The Circuit Court of Appeals for the Seventh Circuit on petitioners' appeal affirmed the order of the District Court on April 18, 1934. The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 815 (R. 95-102).

Petitioners on argument to the Circuit Court of Appeals filed with its consent the printed case (record) in *Pollard* v. *Tobin,* 211 Wis. 405.

The Circuit Court of Appeals in its opinion states in respect of the decision of the Wisconsin Supreme Court in *Pollard* v. *Tobin,* 211 Wis. 405:

> "Appellants urge that this ruling contravenes a recent decision of the Supreme Court of Wisconsin, *Pollard* v. *Tobin,* — Wis. —, 247 N. W. 453. That decision involved the identical question now under con-

> sideration, arising out of a transaction between the same bankrupt and another bank, in which there were pledged under similar circumstances, bonds practically identical in form and terms with the bonds herein involved. There the court held that the bonds were negotiable, and that the bank was a holder in due course, * * *." (R. 97.)

The Circuit Court of Appeals nevertheless refused to follow or accept the decision of the Wisconsin Supreme Court as binding in the interpretation and application of the Wisconsin Negotiable Instruments Law on the ground that it was not bound by a decision of a State court interpreting or applying a uniform law, such as the Negotiable Instruments Law (R. 100-101). It charged petitioners with constructive notice that the pledgor, named as trustee in the trust indenture securing said bonds, held the bonds themselves in trust, and charged petitioners with constructive notice of the contents of the trust indenture in respect of the right or authority of the trustee named in the trust indenture to pledge said bonds (R. 97-100).

This decision of the Circuit Court of Appeals was rendered prior to the decision of the Supreme Court of the United States in the case of *Burns Mortgage Company, Inc.* v. *Fried*, decided May 28, 1934 (78 L. Ed. 939), which held that a Federal court was bound to follow the decision of the State court construing and applying its Negotiable Instruments Law in respect of a transaction governed by such Law.

B.

Reasons Relied on for the Allowance of the Writ.

(1) The decision of the Circuit Court of Appeals for the Seventh Circuit construing and applying the Wisconsin Negotiable Instruments Law is in conflict with the decision of the Supreme Court of the State of Wisconsin

on the same matter in the case of *Pollard* v. *Tobin*, 211 Wis. 405.

(2) The decision of said Circuit Court of Appeals in refusing to accept and follow the decision of the Supreme Court of the State of Wisconsin in the case of *Pollard* v. *Tobin*, 211 Wis. 405, construing and applying the Negotiable Instruments Law of the State of Wisconsin, is in direct conflict with the decision of the Supreme Court of the United States in the case of *Burns Mortgage Company, Inc.* v. *Fried* (78 L. Ed. 939).

(3) The decision of said Circuit Court of Appeals construing and applying the Uniform Negotiable Instruments Law in respect of constructive notice is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, on the same matter, in the case of *Crittenden* v. *Widrevitz*, 272 F. 871.

(4) The decision of said Circuit Court of Appeals in interpreting Section 116.61 of the Wisconsin Statutes of 1929 (part of Negotiable Instruments Law) is an erroneous decision of an important question in conflict with the weight of authority. The particular decisions referred to are: *Nickey Bros.* v. *Lonsdale Mfg. Co.*, 149 Tenn. 1; *Hotchkiss* v. *National Shoe & Leather Bank*, 21 Wall. 354; *Swift* v. *Smith*, 102 U. S. 442.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit sitting at the City of Chicago, Illinois, commanding the court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause to the end that this cause may be reviewed and determined by this Honorable Court, as pro-

vided by the Acts of Congress, and that said judgment of said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as may seem proper.

And your petitioners will ever pray.

MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE and WEST SIDE BANK,

By GEORGE D. VAN DYKE,

Counsel for Petitioners.

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DOUGLAS VAN DYKE,
LEON E. KRUMHEIMER,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 148

IN THE MATTER OF HACKETT, HOFF & THIERMANN, INC., BANKRUPT.

MARINE NATIONAL EXCHANGE BANK OF MILWAUKEE AND WEST SIDE BANK,
Petitioners and Appellants Below,

vs.

KALT-ZIMMERS MANUFACTURING COMPANY AND M. H. GROSSMAN, TRUSTEE IN BANKRUPTCY.
Respondents and Appellees Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion in the United States District Court for the Eastern District of Wisconsin is reported in 6 Fed. Supp. 638 (R. 77).

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was rendered on April 18, 1934, and is reported in 70 F. (2d) 815 (R. 95).

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 18, 1934 (R. 103).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stat. 938.

3. Bearer bonds of respondent, Kalt-Zimmers Manufacturing Company, were executed and issued in and pledged to petitioners in Wisconsin (R. 9, 33-37, 53, 28). The Circuit Court of Appeals for the Seventh Circuit was required to determine whether under the laws of the State of Wisconsin said bonds were negotiable instruments and whether petitioners were holders thereof in due course. Said Circuit Court of Appeals construed and applied Section 116.61, Wisconsin Statutes of 1929, directly contrary to the prior interpretation and application of the same section of the Negotiable Instruments Law by the Supreme Court of Wisconsin (R. 96-102). Said Circuit Court of Appeals ruled that constructive notice was sufficient to constitute notice under said section of the Wisconsin Statutes (R. 100).

4. The cases believed to sustain said jurisdiction are as follows:

Burns Mortgage Company, Inc. v. *Fried,* 78 L. Ed. 939;
Forsyth v. *Hammond,* 166 U. S. 514.

III.

Statement of the Case.

This has already been stated in the preceding petition under A. (pp. 1-4), which is hereby adopted and made part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding that petitioners had notice of a defect in the pledgor's title to said Kalt-Zimmers Manufacturing Company bonds under the provisions of Section 116.61, Wisconsin Statutes of 1929.

2. Said Circuit Court of Appeals erred in refusing to accept and follow the decision of the Supreme Court of Wisconsin in the case of *Pollard* v. *Tobin*, 211 Wis. 405, construing and applying the Negotiable Instruments Law of that State.

V.

ARGUMENT.

Summary of the Argument.

POINT A. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONSTRUING AND APPLYING THE WISCONSIN NEGOTIABLE INSTRUMENTS LAW IS IN CONFLICT WITH THE LATEST DECISION OF THE SUPREME COURT OF WISCONSIN ON THE SAME MATTER, NAMELY, POLLARD V. TOBIN, 211 WIS. 405.

POINT B. THE DECISION OF SAID CIRCUIT COURT OF APPEALS IN REFUSING TO ACCEPT AND FOLLOW THE DECISION OF THE SUPREME COURT OF WISCONSIN CONSTRUING AND APPLYING THE NEGOTIABLE INSTRUMENTS LAW OF THAT STATE IS IN DIRECT CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN BURNS MORTGAGE COMPANY, INC., V. FRIED, 78 L. ED. 939.

POINT C. THE DECISION OF SAID CIRCUIT COURT OF APPEALS CONSTRUING AND APPLYING THE NEGOTIABLE INSTRU-

MENTS LAW IN RESPECT OF NOTICE IS IN CONFLICT WITH A PRIOR DECISION OF A CIRCUIT COURT OF APPEALS FOR ANOTHER CIRCUIT, NAMELY, CRITTENDEN v. WIDREVITZ, 272 F. 871 (C. C. A. 2ND).

POINT D. THE DECISION OF SAID CIRCUIT COURT OF APPEALS IS AN ERRONEOUS CONSTRUCTION OF THE UNIFORM NEGOTIABLE INSTRUMENTS LAW AND IS IN CONFLICT WITH THE WEIGHT OF AUTHORITY.

Nickey Bros. v. *Lonsdale Mfg. Co.*, 149 Tenn. 1;
Hotchkiss v. *National Shoe & Leather Bank*, 21 Wall. 354;
Swift v. *Smith*, 102 U. S. 442.

Point A.

The decision of the Circuit Court of Appeals for the Seventh Circuit construing and applying the Wisconsin Negotiable Instruments Law is in conflict with the latest decision of the Supreme Court of Wisconsin on the same matter, namely, Pollard v. Tobin, 211 Wis. 405.

This case involves the application of the Uniform Negotiable Instruments Law as enacted in Wisconsin to the following facts, to-wit: certain bearer bonds were executed and issued by respondent, Kalt-Zimmers Manufacturing Company, in the city of Milwaukee, Wisconsin, and were thereafter in said city pledged for value to petitioners by the bankrupt, Hackett, Hoff & Thiermann, Inc., which was named trustee in the trust indenture securing said bonds (R. 9, 33-37, 53). It was undisputed that all requirements to constitute petitioners holders in due course of said bonds existed, except that respondent claimed petitioners were chargeable with notice of the alleged defect in the pledgor's title to said bonds. There was no evidence to show any actual knowledge or notice on petitioners' part of any defect in the pledgor's title.

The Supreme Court of Wisconsin held bonds virtually identical in form and terms negotiable instruments under Chapter 116, Wisconsin Statutes of 1929, (part of Uniform Negotiable Instruments Law), and, in *Pollard* v. *Tobin*, 211 Wis. 405, that court construed and applied Section 116.61, Wisconsin Statutes of 1929, which reads as follows:

> "*Actual knowledge of infirmity necessary to notice.* To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In that case the Wisconsin Supreme Court upon identical facts held that the pledgee bank was a holder in due course of said bonds and that the taking of said bonds under the same circumstances did not constitute a taking in bad faith within the meaning of said Section 116.61.

The Circuit Court of Appeals for the Seventh Circuit in its opinion states that the identical question in the instant case was decided by the Wisconsin Supreme Court in *Pollard* v. *Tobin*, 211 Wis. 405 (R. 97). However, said Circuit Court of Appeals refused to accept or follow the construction and application of the Negotiable Instruments Law of Wisconsin by the Supreme Court of that State (R. 100-101). In conflict with that decision, said Circuit Court of Appeals held that petitioners were chargeable with constructive notice of a defect in the pledgor's title to said bonds. The result is that the title of pledgees of similar bonds is held to be valid in the State courts of Wisconsin and invalid in the Federal courts.

Point B.

The decision of said Circuit Court of Appeals in refusing to accept and follow the decision of the Supreme Court of Wisconsin construing and applying the Negotiable Instruments Law of that State is in direct conflict with the decision of the Supreme Court of the United States in Burns Mortgage Company, Inc., v. Fried, 78 L. Ed. 939.

Although the Circuit Courts of Appeals have differed on the question of whether or not they are bound in the interpretation or application of a provision of a uniform law by a decision of a State court, it is now settled that the Circuit Courts of Appeals must accept and follow the decisions of a State court construing and applying its Negotiable Instruments Law.

Burns Mortgage Company, Inc. v. *Fried,* 78 L. Ed. 939. (See cases cited therein.)

It is respectfully submitted that said Circuit Court of Appeals erred in refusing to accept and follow the decision of the Supreme Court of Wisconsin in *Pollard* v. *Tobin,* 211 Wis. 405, construing and applying its Negotiable Instruments Law.

Point C.

The decision of said Circuit Court of Appeals construing and applying the Negotiable Instruments Law in respect of notice is in conflict with the prior decision of a Circuit Court of Appeals for another circuit, namely, Crittenden v. Widrevitz, 272 F. 871 (C. C. A. 2d).

Said Circuit Court of Appeals in charging petitioners with knowledge of the contents of the trust indenture applied a doctrine of constructive notice in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Crittenden* v. *Widrevitz,* 272 F. 871.

Point D.

The decision of said Circuit Court of Appeals is an erroneous construction and application of an important provision of the Uniform Negotiable Instruments Law and is in conflict with the weight of authority.

A rule at one time prevailed in some jurisdictions that, if anything appeared upon the face of a negotiable instrument or from the facts and circumstances attending its transfer, which would put one of ordinary prudence upon inquiry the holder of such instrument was bound to make such inquiry and was charged with notice of the facts he might have learned.

This rule of constructive notice has not prevailed in the Federal courts and was excluded by express language from the Uniform Negotiable Instruments Law. A history of this rule of constructive notice and the change made by the Uniform Negotiable Instruments Law is found in the case of *Nickey Bros.* v. *Lonsdale Mfg. Co.*, 149 Tenn. 1.

By the weight of authority under the Uniform Negotiable Instruments Law it is now the rule that a purchaser of a negotiable instrument for value before maturity holds good title to the instrument, unless he had actual knowledge of a defect in the title of the holder, or of facts which make his taking thereof bad faith. Section 116.61, Wisconsin Statutes of 1929.

Hotchkiss v. *National Shoe & Leather Bank*, 21 Wall. 354;
Swift v. *Smith*, 102 U. S. 442;
Nickey Bros. v. *Lonsdale Mfg Co.*, 149 Tenn. 1;
Pollard v. *Tobin*, 211 Wis. 405;
Section 116.61, Wisconsin Statutes of 1929.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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